

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BILLY J. TAYLOR

Claimant

VS.

AMERICAN BUILDERS & COMPANY

Respondent

AND

ACE AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,063,065

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 26, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Phillip B. Slape, of Wichita, Kansas, appeared for claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ denied claimant's request for medical treatment for his right knee and back, stating that the first time claimant complained of right knee and back problems was on December 12, 2012. ALJ Clark did not find Dr. Pedro Murati's opinions set out in the report of his examination of claimant on December 12, 2012, to be persuasive.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 26, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of whether claimant's back and right knee were injured as a direct and natural result of the original left knee injury of April 30, 2012, and whether claimant is entitled to medical treatment for his lower back and right knee.

Respondent contends the Board does not have jurisdiction over the issues in this appeal from a preliminary hearing order.

The issues for the Board's review are: Does the Board have jurisdiction over the issues in this appeal from a preliminary hearing order? If so, did claimant prove the injuries to his lower back and right knee are a direct and natural result of the original left knee injury of April 30, 2012?

FINDINGS OF FACT

On April 30, 2012, claimant climbed onto a roof to deliver a bundle of shingles to a home. In the process of moving around on the roof, claimant twisted his left knee and suffered injuries. Respondent has accepted compensability of the claim for claimant's injured left knee. Claimant underwent left knee arthroscopic surgery on June 1, 2012, to repair a meniscus tear. He followed up with the surgeon for about a month and also had post-surgery physical therapy, although he only went to 6 of the 12 sessions. There is no mention of right knee or low back problems in claimant's medical records both before and after his surgery, or in the discharge summary from physical therapy, until claimant was seen by Dr. Murati. The July 23, 2012, discharge summary from the physical therapist does note that claimant had a "mild limp" due to "lack of full [left] knee extension."¹

Claimant was seen by Dr. Murati on December 12, 2012, at the request of claimant's attorney. Claimant complained to Dr. Murati of problems with his lower back and right knee. Claimant told Dr. Murati he started having low back pain about one week after his initial left knee injury. Claimant told Dr. Murati he noticed pain in his right knee about one month following his initial injury, which claimant attributed to overcompensation. After examining claimant, Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy secondary to antalgic gait, left SI joint dysfunction secondary to antalgic gait, bilateral patellofemoral syndrome, bilateral knee flexion contractures, and aggravation of obesity. Dr. Murati opined that all claimant's diagnoses were, within reasonable medical probability, a direct result of the work-related injury that occurred in April 2012. Dr. Murati further stated the work-related accident was "under all reasonable medical certainty and probability the prevailing factor in the development of his conditions."²

Claimant testified he began having problems with his lower back about a month after his surgery. When reminded he told Dr. Murati the back pain started a week after the accident, claimant stated that "right after I got hurt, it was like a little—felt like a little stress. . . . It felt like a stress strain, and then after I had my surgery, because I favored my other leg, it put more pressure on my back and it bothered me more at night"³ Claimant said his low back pain became more intense a couple weeks after he was released from

¹ P.H. Trans., Resp. Ex. 2 at 3.

² P.H. Trans., Cl. Ex. 1 at 5.

³ P.H. Trans. at 8.

treatment in July 2012. Claimant had called his surgeon in early July 2012 asking for a release from treatment so he could go back to work.

Claimant testified he started having problems with his right knee within a week after the left knee injury.⁴ He admitted he did not tell any of his treating physicians about his right knee problems, saying he thought the problems would go away. Neither did he report his problem to his physical therapists. Claimant admits the first time he mentioned his lower back and right knee problems was during his examination by Dr. Murati.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

⁴ He told Dr. Murati the right knee problems started a month after the left knee injury.

⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2012 Supp. 44-555c(k).

ANALYSIS

1. Jurisdiction

K.S.A. 2012 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

K.S.A. 2012 Supp. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) whether the employee suffered an accident, repetitive trauma or resulting injury;
- (2) whether the injury arose out of and in the course of the employee's employment;
- (3) whether notice is given; and
- (4) whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested.

In this appeal, the issue is whether claimant suffered a right knee and low back injury as a result of a compensable injury. The Board considers the question of whether an injury is the direct and natural result of an original or primary injury as being under the umbrella of the "arising out of and in the course of employment" issue, which the Board has jurisdiction to consider on an appeal from a preliminary hearing order.

2. Relationship of low back and right knee to initial injury.

Claimant has the burden of proving that his right knee and back complaints are related to his initial injury. The ALJ ruled that claimant failed to meet the burden. Claimant testified that he had right knee and low back complaints within a week or two of the initial injury. Claimant testified he did not tell any of the doctors or the physical therapist that he had right knee or low back complaints because he thought the symptoms would go away.

The first documented complaints of right knee and low back complaints came eight months after the accident when claimant saw Dr. Murati. While it is not stated in his order, it does not appear that the ALJ found claimant's testimony credible. The ALJ did find Dr. Murati's opinions to be unpersuasive.

The only medical evidence relating to whether claimant is in need of medical treatment as the result of his injury is the report from Dr. Murati. There is no evidence in the record to rebut Dr. Murati's opinions or cast doubt on his credibility as a physician. The ALJ simply found his opinions unpersuasive, even though there was no other medical opinion upon which to rely.

Dr. Murati's opinion that the April 30, 2012, accident is the prevailing factor in the development of claimant's right knee and low back conditions is uncontradicted. Uncontradicted testimony that is neither improbable or untrustworthy cannot be disregarded unless it is shown to be untrustworthy. Respondent provided no evidence to contradict Dr. Murati's opinions or show that Dr. Murati's opinions are improbable or unreliable.

CONCLUSION

Based upon the foregoing, this Board member finds the Board has jurisdiction to rule on this appeal. Additionally, this Board member finds that the weight of the medical evidence supports a finding that claimant is in need of medical treatment for both knees and his low back as the result of his work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated March 26, 2013, is reversed. The respondent and insurance carrier are ordered to provide medical treatment pursuant to Dr. Murati's recommendations.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
pslape@slapehoward.com
dnelson@slapehoward.com
Michael E. Streit, Attorney for Respondent and its Insurance Carrier
mds@wallacesaunders.com
amcfeeters@wallacesaunders.com
John D. Clark, Administrative Law Judge